IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 1:07-cr-00090-WYD

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. B&H MAINTENANCE & CONSTRUCTION, INC., a New Mexico corporation;
2. JON PAUL SMITH a/k/a J.P. SMITH; and
3. LANDON R. MARTIN,

Defendants.

UNITED STATES' OPPOSITION TO "DEFENDANTS' JOINT NOTICE OF INTENT TO USE EVIDENCE OF OTHER CRIMES, WRONGS OR ACTS PURSUANT TO FEDERAL RULE OF EVIDENCE 404(b)" (Docket # 148)

The United States opposes "Defendants' Joint Notice of Intent to Use Evidence of Other Crimes, Wrongs or Acts Pursuant to Federal Rule of Evidence 404(b)" (Docket # 148) (hereinafter "Defendants' Joint Notice") because Defendants do not set forth any theory under which the information they identify is: 1) relevant or material to the determination of any issue in this case; and 2) admissible for a proper purpose under Federal Rule of Evidence 404(b).

Furthermore, Defendants do not identify with any specificity the information they will seek to elicit pursuant to many of their numbered paragraphs; nor do they identify the witnesses through whom they will seek to introduce such information. For example, Defendants' numbered

paragraphs 1 and 2 refer to "claims" made by Jeff Kramme in interviews with Government investigators, letters, and emails. (*See* Defendants' Joint Notice ¶¶ 1, 2) Many "claims" were made in these interviews, letters, and emails, and the great majority of them are not based on Kramme's first hand perception, but rather on rumor, innuendo, and employee gossip and thus are inadmissible hearsay. Additionally, some of Defendants' proposed Rule 404(b) evidence does not relate to participants in the conspiracy, witnesses with knowledge of the conspiracy, or even employees of the corporate coconspirators, B&H Maintenance & Construction, Inc. ("B&H"), and Flint Energy Services, Inc. ("Flint"), or the victim of the conspiracy, BP America Production Company ("BP America"). For example, Defendants' Joint Notice ¶ 4 concerns in-laws of a Flint employee.

Because the proffered evidence is not relevant or material to an issue in this case, and because Defendants do not set forth any purpose for which their proffered Rule 404(b) evidence is admissible, the United States requests the Court to preclude them from offering it at trial.

I. LEGAL ANALYSIS

In accord with Federal Rule of Evidence 404(b), evidence of other crimes, wrongs or acts may not be admitted to prove "the character of a person in order to show action in conformity therewith." Such evidence may be admitted, however, for a number of proper purposes including: "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Fed. R. Evid. 404(b). "The threshold inquiry a court must make before admitting similar acts evidence under Rule 404(b) is whether that evidence is probative of a material issue other than character." *Huddleston v. United States*, 485 U.S. 681, 686 (1988).

In *United States v. Wilson*, 107 F.3d 774 (10th Cir. 1997), the Tenth Circuit applied the four prong guideline for admissibility of Rule 404(b) evidence set forth in *Huddleston*, 485 U.S. at 681:

> To determine if the admission of Rule 404(b) evidence was proper, we apply a four-part test which requires that: (1) the evidence was offered for a proper purpose under Fed.R.Evid. 404(b); (2) the evidence was relevant under Fed.R.Evid. 401; (3) the probative value of the evidence was not substantially outweighed by its potential for unfair prejudice under Fed.R.Evid. 403; and (4) the district court, upon request, instructed the jury to consider the evidence only for the purpose for which it was admitted.

Wilson, 107 F.3d at 782. *See also United States v. Record,* 873 F.2d 1363, 1374 (10th Cir. 1989)*; United States v. Zamora*, 222 F.3d 756, 762 (10th Cir. 2000); *United States v. Mares*, 441 F.3d 1152, 1156 (10th Cir. 2006), *cert. denied*, 127 S.Ct. 3048 (2007).

While Defendants clearly have a right to present a defense to the charges against them, "[t]he defendant's presentation of evidence is constrained by the twin prongs of relevancy and materiality. Simply stated, a criminal defendant does not have a constitutional right to present evidence that is not relevant and not material to his defense." *United States v. Solomon*, 399 F.3d 1231, 1239 (10th Cir. 2005). *See also U.S. v. Montelongo*, 420 F.3d 1169, 1173 (10th Cir. 2005); *United States v. Markey*, 393 F.3d 1132, 1135 (10th Cir. 2004). Furthermore, to be admissible under Rule 404(b), evidence must be offered for a proper purpose. Proper purposes include "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Fed. R. Evid. 404(b). "Rule 404(b) presents a narrow threshold inquiry which must be answered before other act evidence can be admitted, namely, whether the

evidence is offered for a purpose other than to prove criminal propensity." *United States v. Tan*, 254 F.3d 1204, 1208 (10th Cir. 2001).

II. ANALYSIS OF THE INFORMATION SET FORTH IN DEFENDANTS' JOINT NOTICE

Defendants' Joint Notice contains eight numbered paragraphs listing information they seek to introduce pursuant to Rule 404(b). The information set forth by Defendants is vague and non-specific, and, except for numbered paragraphs 6 and 7, Defendants do not even identify a witness through whom they will seek to introduce the information.

Furthermore, Defendants have neither articulated the relevance and materiality of the evidence they seek to offer under Rule 404(b), nor the purpose for which they seek to offer that evidence. The other acts evidence listed in Defendants' Joint Notice should be excluded because it is not relevant to the issues in this case, is not material, and is not offered for a proper purpose under Rule 404(b).

A. Defendants' Numbered Paragraphs 1, 2 and 5 Relate to Hearsay "Claims" Made by Jeff Kramme in Interviews, Letters, and Emails

Defendants' numbered paragraph 1 relates to unspecified "claims" by former Flint employee Jeff Kramme of "acts of theft" by nameless Flint employees and inspectors. Numbered paragraph 2 relates to Kramme's "claims" of Flint's "cover-up of allegations of corruption," again by nameless individuals. Paragraph 5 relates to diversion of construction

materials from job sites by Flint employees, including (but apparently not limited to), Defendants' coconspirator Kenneth Rains.[1]

Nowhere have Defendants explained how these unspecified acts are relevant and material to a determination of whether: 1) a conspiracy to rig bids existed; 2) Defendants were members of the conspiracy; and 3) interstate commerce. Furthermore, Defendants have not identified any proper purpose for which the information would be admissible under Rule 404(b).

The Defendants have also not identified a witness through whom they will seek to introduce these unspecified acts. Mr. Kramme was a Flint employee from May 16, 2005, until April 27, 2006. Many of the incidents he related in his interviews, letters, and emails pre-date his employment with Flint. He learned of them through rumor, innuendo, and employee gossip, and has no personal knowledge of them. Therefore, while Mr. Kramme set out these allegations in his letters, interviews, and email, even if the information were relevant -- which it isn't -- he would not be competent to testify due to his lack of personal knowledge. *See* Fed. R. Evid. 602. ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.")

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[1] The United States will call Mr. Rains as a witness in its case. The United States fully expects that Defendants will cross examine Mr. Rains about matters going to his credibility. Federal Rule of Evidence 608, however, limits attacks on the credibility of a witness to evidence concerning "character for truthfulness or untruthfulness," (Fed. R. Evid. 608(a)), and further specifies that specific instances of conduct may not be proved by extrinsic evidence (Fed. R. Evid. 608(b)). *See* United States' Motion in Limine to Exclude Improper Character Evidence, Docket # 79.

Mr. Kramme does have personal knowledge of the fact that Rains was rigging bids with the Defendants. Information concerning that is also set forth in his letters and emails, and the notes of his interviews.

B. Defendants' Numbered Paragraph 3 Relates to Allegations that Rains and Another Individual Used Flint Company Materials for Personnal Benefit

In numbered paragraph 3, Defendants cite to more claims that were made by Jeff Kramme in his interviews, letters, and emails to the effect that Rains, "and other employees at Flint," misused the assets of their employer. Here too, Kramme's claims are based on rumor, innuendo, and employee gossip, and he is not competent to testify about them under Fed.R.Evid. 602. Furthermore, these claims are not relevant or material to any issue in this case. Defendants try to bolster their recitation of this information by specifying the size and color of the pipe that Rains used on his roping arena and fencing, mixing these factual descriptions with unsubstantiated allegations that the pipe came from Flint construction projects and was welded by Flint employees whose labor was charged to Flint.

Defendants go on to cite to "evidence" from Kristi Sikes, a former Flint employee, who was interviewed by the United States on January 31, 2006. Notes of that interview are far from clear about the extent of Sikes' first hand knowledge.[2] Further, a review of the notes does not support Defendants' allegation that Sikes accused Matt Davidson, another Flint employee, of

[2] The United States has provided a copy of the paralegal's notes of that interview to the Defendants.

"corporate theft."[3] If Defendants have interviewed Ms. Sikes and have notes of the interview supporting their allegations, the United States requests a copy of the notes.

With respect to all of the information set forth in numbered paragraph 3, Defendants have not explained how these acts are relevant and material to a determination of any matter at issue in this case, nor have they identified any proper purpose for which the information would be admissible under Rule 404(b).[4]

C. Defendants' Numbered Paragraph 4 Relates to Allegations Against Matt Davidson, a "Close Associate" of Defendants' Coconspirator Rains, and Against Davidson's In-Laws

Matt Davidson was not a participant in the conspiracy, and based on the information he gave the United States when he was interviewed, he has no knowledge of the conspiracy.[5] Davidson's in-laws were not interviewed by the United States. They were not alleged to have participated in the conspiracy and are not even employees of the corporate coconspirators, B&H or Flint, or the victim of the conspiracy, BP America.

Defendants have apparently focused on Davidson because he is a "close associate of Rains," and on his in-laws because they constructed a roping arena allegedly made from gas

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[3] The paralegal's notes say that Sikes answered the phone for Davidson; paperwork went through her before it went to Davidson; and she liked him, he treated her pretty well, but he lied to her about raises, etc., so she quit.

[4] Whether information relating to Rains' alleged misuse of company assets could be a proper subject for cross-examination is not a matter addressed in this pleading. *See* United States' Motion in Limine to Exclude Improper Character Evidence, Docket # 79.

[5] The United States has provided a copy of the paralegal's notes of Davidson's interview to the Defendants.

pipeline. Nowhere have Defendants explained how any of Davidson's acts, or those of his in-laws, are relevant and material to a determination of any matter at issue in this case, nor have they identified any proper purpose for which such information would be admissible under Rule 404(b).

D. Defendants' Numbered Paragraphs 6 and 7 Relate to Allegations that Rains Attempted to Bribe Employees of Other Companies

Defendants' numbered paragraphs 6 and 7 relate to allegations by Harley Temple and Patrick Kannard that Rains tried to bribe them. Rains has denied those allegations. Defendants have set forth no theory under which testimony by Temple and Kannard would be admissible under Rule 404(b).[6]

Furthermore, Defendants' characterization of what Temple will say if he is permitted to testify is not substantiated by the information Temple gave the United States when he was interviewed on February 8, 2007.[7] During the United States' interview of Temple he said that Rains asked him what it took to get more Duke work, and that "we" could help out monetarily. Temple said he never reported this to his superiors, and thought Rains was joking until he heard of the investigation into bid rigging. This is a far cry from Defendants' claim that "Rains told Temple that Rains would split profits with Temple if Temple could get Flint all of Duke's work

[6] Whether Temple's and Kannard's allegations go to Rains' character for truthfulness, and whether Defendants may cross examine him about those allegations is a matter addressed by United States' Motion in Limine to Exclude Improper Character Evidence (Docket # 79).

[7] The paralegal's notes of the interview with Harley Temple have been provided to Defendants.

or at least most of Duke's work." *See* Defendants' Joint Notice at ¶ 6. If Defendants made notes of their interviews of Temple and Kannard, the United States requests a copy of the notes.

Because the proffered evidence is not relevant or material to an issue in this case, and because Defendants do not set forth any purpose for which their proffered Rule 404(b) evidence is admissible, the United States requests the Court to preclude them from offering it at trial.

E. Defendants' Numbered Paragraph 8 Relates to the Unauthorized Purchase of Holiday Gift Cards for Customers

Defendants' numbered paragraph 8 sets forth an allegation that was made by Jeff Kramme. Rains told Kramme to purchase $200 gift cards and pass them out before the Christmas holiday season to various BP America employees. Kramme does have first hand knowledge of this event. Defendants, however, have not articulated any theory as to why Rains' wish to give gift cards to BP America employees at Christmas-time, whether it was authorized by Flint or not, is relevant or material, or offered for a proper purpose under Rule 404(b).

III. CONCLUSION

Defendants have not set forth any theory under which the information they have listed in Defendants' Joint Notice is: 1) relevant or material to the determination of any issue in this case; and 2) admissible for a proper purpose under Rule 404(b). Consequently, the United States requests the Court to preclude Defendants from introducing this information into evidence in the trial of this case pursuant to Rule 404(b).

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2007, I electronically filed the foregoing "United States' Opposition to Defendants' Joint Notice of Intent to Use Evidence of Other Crimes, Wrongs or Acts Pursuant to Federal Rule of Evidence 404(b)" (Docket # 148) with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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I hereby certify that I have mailed or served the document or paper to the following non CM/ECF participants in the manner indicated by the non-participant's name:

None.

Respectfully Submitted,

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